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No. 85-1743

In the Supreme Court of the United States

OCTOBER TERM, 1985

TEAMSTERS LOCAL 317, PETITIONER

v.

CLINTON'S DITCH COOPERATIVE CO., INC. AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioner challenges the court of appeals' conclusion that the National Labor Relations Board erred in finding that respondent Clinton's Ditch Cooperative Co. was a "joint employer" for purposes of the National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*

1. Clinton's Ditch Cooperative Co. (Clinton) is a soft drink bottler and distributor. Until 1976, Clinton directly employed truck drivers represented by petitioner Local 317 to deliver its products (Pet. App. A32-A33). In 1976, Clinton subcontracted its delivery operation to Fairfield Transportation Corp. (Fairfield). Fairfield hired Clinton's complement of drivers and assumed Clinton's responsibilities under the collective bargaining agreement with petitioner (*id.* at A35-A36). The delivery operation did not change substantially after the subcontract to Fairfield. The drivers served the same customers out of the same garage with the same trucks (*id.* at A38).

In 1978, petitioner negotiated a new collective bargaining agreement with Fairfield. During negotiations, Fairfield asserted that it could not enter into a binding agreement without clearing it with Clinton (Pet. App. A46, A60). However, only Fairfield signed the new agreement with petitioner (*id.* at A57).

Following unsuccessful negotiations over a rate increase in its subcontract with Clinton, Fairfield sent Clinton a termination notice effective October 31, 1980 (Pet. App. A53). Clinton then entered into a new subcontract with Global Leasing, Inc. (Global), which hired a new complement of drivers (*id.* at A55-A57). Clinton refused to bargain with petitioner concerning its decision to subcontract its delivery operation to Global (*id.* at A54). Petitioner then filed an unfair labor practice charge with the Board alleging that Clinton had unlawfully subcontracted its trucking operation to Global.

2. The Board found that Clinton and Fairfield were joint employers of the drivers who made deliveries for Clinton and that Clinton violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), when, after its contract with Fairfield was scheduled to terminate, it subcontracted its trucking operation to Global without bargaining with petitioner concerning the subcontracting decision (Pet. App. A24). Affirming the administrative law judge's findings of fact, the Board concluded that Clinton and Fairfield "shared or codetermined matters governing the essential terms and conditions of employment of the drivers" (*id.* at A22 n.3).[1] The Board ordered

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[1]The ALJ had found that, after entering into the Fairfield subcontract, Clinton continued to be involved in collective bargaining negotiations and active supervision of the drivers. He also found that "Clinton's Ditch effectively disciplined drivers * * * [and gave them] orders * * * which directly affected their wages" (Pet. App. A60). The Board did not rely on his discussion of "other factors that are relevant only in the single employer context" (*id.* at A22 n.3).

Clinton, inter alia, to offer reinstatement to the displaced drivers, make them whole, and bargain with petitioner (*id.* at A26, A64-A65).[2]

The court of appeals denied enforcement of the Board's order, concluding that "there is insufficient evidence to support the [B]oard's determination that Clinton's Ditch and Fairfield were joint employers of the drivers" (Pet. App. A20).[3] The court stated (*id.* at A19):

> This is not a case in which Clinton's Ditch merely leased drivers from Fairfield and then treated them as its own employees. Rather, it was Fairfield or its dispatchers that: hired and fired drivers; disciplined drivers; handled drivers' records, payrolls, and taxes; supervised drivers in their day-to-day work; and bargained collectively with the drivers' union. Clinton's Ditch did not participate in hiring and firing, and had only an indirect, limited connection to problems of pay, discipline, or any other aspect of labor relations.

3. The petition presents the question whether the court of appeals erred in rejecting the Board's finding that Clinton and Fairfield were joint employers.[4] The Board believes

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[2]Member Hunter would have additionally found that Clinton was bound to the collective bargaining agreement between Fairfield and Local 317 and that its failure to apply that agreement violated Section 8(a)(5) and (d) of the Act (29 U.S.C. 158(a)(5) and (d)). See Pet. App. A22-A23 n.3.

[3]Accordingly, the court did not consider whether petitioner had waived its right to bargain or whether ~~the~~ Clinton's subcontracting decision was a mandatory subject of bargaining (see Pet. App. A11).

[4]The second question raised by petitioner (Pet. i, 16-19)—whether the court of appeals erred in finding a waiver of petitioner's right to bargain—was not directly decided by the court of appeals. The court's discussion of the impact of petitioner's failure to insist that Clinton sign petitioner's collective bargaining agreement with Fairfield (see Pet. App. A17-A18, A19) was addressed largely to whether Clinton and Fairfield were joint employers, not to the separate issue whether petitioner had waived its collective bargaining rights.

that the court of appeals should have affirmed its joint employer finding. The Board, however, did not file a petition for a writ of certiorari because, in its view, there are no special or important reasons for this Court's review. See Sup. Ct. R. 17.1. The dispute here turns on the particular facts of this case. Accordingly, the decision below is not one that this Court ordinarily would review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).[5]

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[5]Whether or not a company possesses "sufficient indicia of control to be an 'employer' is essentially a factual issue * * *" (*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964)). While the various circuits may state the standard somewhat differently, all agree that the nature and extent of control over the employees' working conditions is determinative. Thus, all of the cases cited by petitioner (Pet. 11-12 n.2) where joint employer status was found involve evidence of substantial control over working conditions that the Second Circuit concluded was lacking here. See *Carrier Corp.* v. *NLRB,* 768 F.2d 778, 781 (6th Cir. 1985) (day to day supervision of drivers); *NLRB* v. *Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1124-1125 (3d Cir. 1982) (same); *Sun-Maid Growers* v. *NLRB,* 618 F.2d 56, 59 (9th Cir. 1980) (assigned work and controlled scheduling); *NLRB* v. *Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1272 (4th Cir. 1970) (de facto control over the employees); *Ref-Chem Co.* v. *NLRB,* 418 F.2d 127, 129 (5th Cir. 1969) (co-determination of essential terms of employment). In *International Chemical Workers Union Local 483* v. *NLRB,* 561 F.2d 253, 256-257 (D.C. Cir. 1977), the court upheld the Board's finding of no joint employer status because the company in question did not direct the employees in "the details" of their work. Finally, while the Eighth Circuit in *Pulitzer Publishing Co.* v. *NLRB,* 618 F.2d 1275, 1278-1279, cert. denied, 449 U.S. 875 (1980), did apply a four-factor test to a joint employer determination, that court has subsequently indicated that "control over the employment conditions" is the critical factor. *NLRB* v. *C.R. Adams Trucking, Inc.*, 718 F.2d 869, 870 (8th Cir. 1983). See also *Industrial Personnel Corp.* v. *NLRB,* 657 F.2d 226, 229 (8th Cir. 1981), cert. denied, 454 U.S. 1148 (1982); *Ace-Alkire Freight Lines, Inc.* v. *NLRB,* 431 F.2d 280, 282 (8th Cir. 1970).

Respectfully submitted.

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